

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

State of Minnesota, by  
Kathryn R. Roberts,  
Acting Commissioner,  
Department of Human Rights,

Complainant,

POST HEARING  
EVIDENTIARY  
ORDER

VS.

Independent School District  
No. 695,

Respondent.

The above-entitled matter is before the undersigned Administrative Law Judge pursuant to a Complaint and a Notice And Order For Hearing dated July 20, 1984. The hearing was held commencing on Tuesday, October 23, 1984, and has been concluded. During the course of the hearing, one evidentiary ruling was taken under advisement so that written argument could be prepared.

Deborah J. Kohler and Helen G. Rubenstein, Special Assistant Attorneys General, 1100 Bremer Tower, Seventh Place and Minnesota Street, St. Paul, Minnesota 55101, have appeared on behalf of the Complainant. John D. Kelly, Hanft, Fride, O'Brien & Harries, P.A., Attorneys at Law, 1200 Alworth Building, Duluth, Minnesota 55802, has appeared on behalf of the Respondent.

During the course of the hearing the Respondent subpoenaed its employee, Richard Stocco, for the purpose of questioning him concerning the charging party's allegations that he forced her to perform various sexual acts. At the hearing, Stocco appeared with his counsel, Harry Eliason, Eliason & Murray, 402 East Howard Street, Hibbing, Minnesota 55746. When questioned by the Respondent, Stocco refused to answer any questions propounded to him on the grounds that his answers might tend to incriminate him for purposes of the Fifth Amendment. At that time, Stocco also objected the the Respondent's introduction of his prior statements to the St. Louis County Sheriff regarding criminal charges the charging party made against him. Stocco asserted that the introduction of those statements would violate his Fourth Amendment rights and the Minnesota Governmental Data Practices Act. In addition on October 23, 1984, Stocco filed a written objection to the introduction of that evidence as a violation of his privacy rights under Minnesota law.

On October 25, 1984, the Administrative Law Judge wrote to MT. Eliason

requesting that he file written arguments pertaining to his standing to  
move

to exclude the evidence offered by the Respondent and the legal grounds for his motion by November 14, 1984. No arguments were filed by him. However, the Respondent and the Complainant both filed written arguments addressing the admissibility of Stocco's statements to the St. Louis County Sheriff. Both statements were received on November 26, 1984.

Now, therefore, based on all the files, records, and proceedings herein, including the arguments of counsel;

IT IS HEREBY ORDERED: That the Complainant's hearsay objection to the admissibility of Stocco's statements be, and the same hereby is, sustained.

Dated this 6th day of December, 1984.

JON L. LUNDE  
Administrative Law Judge

#### MEMORANDUM

The issue that must be decided is whether or not Stocco's statements to the St. Louis County Sheriff's Office constitute inadmissible hearsay evidence, or whether it comes within any of the generally recognized exceptions to the hearsay rule. The admissibility of evidence in a contested case proceeding is governed by Minn. Stat. sec. 14.60 which provides, in part, as follows:

Subdivision 1. Admissibility. in contested cases agencies may admit and give probative effect to evidence which possesses probative value commonly accepted by reasonable prudent persons in the conduct of their affairs. They shall give effect to the rules of privilege recognized by law. They may exclude incompetent, irrelevant, immaterial and repetitious evidence.

Subdivision 3. Cross-examination of witnesses. Every party or agency shall have the right of cross-examination of witnesses who testify, and shall have the right to submit rebuttal evidence.

The cited statutory provisions have been implemented by rules of the Chief Administrative Law Judge. Minn. Rule 1400.7300, subp. 1 governs the admissibility of evidence. It reads as follows:

Subpart 1. Admissible evidence. The hearing examiner may admit all evidence which possess probative value, including hearsay, if it is the type of evidence on which reasonable, prudent persons are accustomed to rely in the conduct of their serious affairs. The hearing examiner shall give effect to the rules of privilege recognized by law. Evidence which is incompetent, irrelevant, immaterial or unduly repetitious may be excluded.

For purposes of the statutes and rules cited above, hearsay evidence upon which reasonable, prudent persons are accustomed to rely in the conduct of their serious affairs may be received into evidence if it possess probative value. In determining whether Stocco's statements to the St. Louis County Sheriff Is Department possess the requisite degree of probative value, it is proper to consult the rules of evidence applicable to the District Courts in Minnesota. Those rules, especially the rules pertaining to hearsay evidence, generally define, by the exceptions listed, the kind of hearsay evidence which a reasonably prudent person would rely upon. The Respondent argues that Stocco's statements are admissible under Rule 804(b)(3) and (5) because he is unavailable for purposes of Rule 804(a)(1) of the Minnesota Rules of Evidence.

Rule 804 of the Minnesota Rules of Evidence permits the introduction of hearsay evidence when a declarant is unavailable. Unavailability is defined in Rule 804(a)(1) which reads as follows:

(a) Definition of Unavailability. 'Unavailability of the witness' includes situations in Which the declarant ---  
(1) is exempted by ruling of the court on the ground of privilege concerning the subject matter of his statement.

The critical factor in determining 'unavailability' is actually the unavailability of testimony, rather than the unavailability of the declarant. McCormick on Evidence, p. 753 - 754 (3rd Ed. 1984). Consequently, it is well established that the exercise of a privilege not to testify renders the witness unavailable to the extent of the scope of the privilege. Id at 754 n. 10. The Complainant argues, however, that Stocco's invocation of The privilege against self-incrimination did not render him unavailable for purposes of the cited rule because he was not "exempted by ruling of the court' from testifying at the hearing. Because the Administrative Law Judge made no preliminary determination of Stocco's right to invoke the Fifth Amendment privilege, and did not exempt him from testifying on the grounds of the privilege asserted, the Complainant argues that he was not unavailable for purposes of the rule.

Many cases uphold the Fifth Amendment privilege against self-incrimination in administrative proceedings. See, e.g. *Murphy v. Waterfront commission*, 378 U.S. 52 (1964); *Smith v. United States*, 337 U.S. 137 (1949). Since Stocco had been charged with several different acts of criminal sexual conduct, and since

the testimony solicited from him pertained to those acts, he was clearly entitled to claim a Fifth Amendment privilege. Although he gave voluntary statements to the St. Louis County Sheriff, he did not, thereby, waive his right to assert the privilege during the course of this proceeding. Generally speaking, the waiver of the self-incrimination privilege is effective throughout, but not beyond, the 'proceeding' in which it is made. See, McCormick, supra, at 347 - 348. He did not waive his privilege in this proceeding. Moreover, the fact that no 'exemption' was granted to Stocco in this proceeding should not result in a finding that he is available where it appears that he had a right to invoke the privilege as he did. Hence, it is concluded that Stocco was available, for purposes of Rule 804(a)(1). Consequently, it must be determined whether his former statements come within the hearsay exceptions upon which the Respondent relies.

Rule 804(b)(3) pertains to prior statements made by an unavailable declarant which were against the declarant's interests. It reads as follows:

(3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

The Respondent argues that Stocco's statement tended to subject him to criminal liability because he admitted to an affair with the charging party which could subject him to criminal charges of adultery or fornication. That argument is wholly unpersuasive. Criminal laws relating to adultery and fornication are seldom enforced and do not carry the same criminal penalties or social stigma that would be involved in charges of criminal sexual conduct. Stocco's inculpatory admission to having an affair with the charging party is hardly a reliable statement against his penal interest in view of the fact that he was being investigated for far more serious crimes which his inculpatory statements would have exculpated him from. Inculpatory statements which have an exculpatory purpose of avoiding more serious criminal charges, severely narrow the extent to which they are inculpatory and against penal

interest. Where such statements are not corroborated with other evidence, they should not be received. They simply do not have the requisite indicia of reliability. See, e.g. State v. Pepin, 110, Wis.2d 431, 328 N.W.2d 898, 902 (Wis. App. 1982). State v. Hansen, 312 N.W.2d 96 (Minn. 1981). The Administrative law Judge does not believe that Stocco's admission to adultery is a sufficiently reliable statement against his penal interest, given the actual charges that were pending against him, to be admissible in this proceeding. The unreliability of those statements becomes even more questionable in light of the fact that the two statements he gave to the St. Louis County Sheriff were inconsistent.

Rule 804(b)(5) contains other exceptions to the admissibility of hearsay statements made by unavailable declarants. It provides as follows:

(5) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. . . .

The Administrative law Judge is not persuaded that Stocco's statement should be admitted under this exception. Clearly, the statements made do not have 'equivalent circumstantial guarantees of trustworthiness, as they are not admissible under Rule 804(b)(3). This exception is not intended to be a surrogate for admitting evidence subject to a listed exception, but is to be used in cases not falling within the other exceptions, if the evidence bears equivalent circumstantial guarantees of trustworthiness. Stocco's inconsistent statements to the St. Louis County Sheriff simply do not have those guarantees of trustworthiness and should not be admitted. Although the Minnesota Rules of Evidence are not controlling in contested case proceedings, they serve as useful guides when evidentiary questions are raised. It is particularly appropriate to follow them in contested cases which can also be pursued in the courts. Under the Minnesota Human Rights Act, Minn. Stat. sec. 363.14, subd. 1, violations of the Act may be brought directly to the District Court.

The parties other arguments need only to be briefly addressed. First, although the Administrative Law Judge is persuaded that Stocco had a right to counsel at the hearing to advise him on his Fifth Amendment rights, his standing to raise objections to Stocco's prior testimony is highly questionable. Moreover, he has waived those objections by his failure to submit the written argument requested by the Administrative Law Judge and by his failure to present any evidence to support his position. Furthermore, the record shows that Stocco was advised of his Fourth Amendment rights by the St. Louis County Sheriff prior to the time his statements were taken, and it is clear that the Sheriff's investigation of the criminal charges brought against Stocco is now inactive for purposes of the Minnesota Governmental Data Practices Act. Minn. Stat. sec. 13.82, subd. 5, states that inactive investigation data is public, unless the release of the data would jeopardize

another ongoing investigation or reveal the identity the victim. Even if it was necessary to protect the identity of the victim (the charging party), her identity could be amply protected by an order of the Administrative Law Judge and the evidence could be received even if it was not public.

Because the statements made by Stocco do not come within the hearsay exceptions in Rule 804, it is concluded that they have do not have probative value of the kind reasonable prudent persons would rely in the conduct of their serious affairs, and that the evidence should not, therefore, be admitted. Therefore, the Complainant's objection to the receipt of Stocco's inconsistent statements to the St. Louis County Sheriff's Department should be sustained. It is not necessary to consider the Complainant's other objections to the receipt of this evidence such as the Respondent's ability to compel Stocco to cooperate with it.

The Administrative Law Judge realizes that excluding this evidence does put the Respondent in a difficult position, but its inability to obtain testimonial evidence from Stocco does not justify receiving evidence having no probative value. Moreover, receipt of Stocco's statements is inconsistent with the Complainant's due process rights to cross-examine crucial witnesses. When the hearsay statements a party seeks to offer are those of a key witness and relate to crucial issues, those statements must have some minimal degree of reliability before they are received. in cases involving purely judicial-type facts, the minimal guarantees of reliability that should exist before cross-examination on crucial testimony is forsaken, are that the hearsay comes within a recognized exception to the hearsay rule. Stocco's statements do not meet that test.

J.L.L.